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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

APPELLATE MEDIATION IN PENNSYLVANIA: LOOKING BACK AT THE HISTORY AND FORWARD TO THE FUTURE

Sandra Schultz Newman and Scott E. Friedman*

I. INTRODUCTION

In recent years, appellate courts have increasingly integrated alternative dispute resolution methods into their procedures in an effort to reduce ever-expanding caseloads. The Pennsylvania Commonwealth Court, for example, adopted an appellate mediation program in September of 1999 and reports that it has been successful. This Article includes a summary of

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the foundations of appellate mediation that traces its primary development in the federal courts of appeal, a discussion of the extension of appellate mediation programs to state appellate courts, and an examination of the specifics of the Commonwealth Court's program. In its final section, the Article concludes that the Commonwealth Court's report of its program's success is well-founded and advocates for extension of that program.

II. FOUNDATIONS OF APPELLATE MEDIATION

A. The Second Circuit

In 1974, Chief Judge Irving R. Kaufman of the Second Circuit instituted the first appellate alternative dispute resolution (ADR) program, hoping to expand upon the successes of ADR in reducing the caseload of courts of original jurisdiction.¹ Chief Judge Kaufman created the Civil Appeals Management Plan (CAMP), which had four main goals: (1) to preserve judicial resources, most notably time, by encouraging dispute resolution without judicial involvement; (2) for cases not subject to ADR, to reduce the time from the filing of an appeal to its disposition; (3) for cases that ADR will not be able to resolve, to help clarify the ultimate issues in the case; and (4) to quickly consider basic procedural motions without expending judicial resources.² Originally, the CAMP program employed one separate full-time Staff Attorney (also called staff counsel), who searched through the Second Circuit's appellate docket for the cases that appeared to be most conducive to settlement.³ The Staff Attorney also

1. See generally Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 Fordham L. Rev. 253 (1988) [hereinafter Kaufman, *New Remedies*] (noting that pre-trial conferences in federal district courts produced "fruitful results"); Irving R. Kaufman, *The Federal Rules: The Human Equation Through Pretrial*, 44 A.B.A. J. 1170, 1172-73 (1958) (indicating that pre-trial conferences in federal district courts led to substantial backlog reduction).

2. Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 Yale L.J. 755, 756 (1986) [hereinafter Kaufman, *Run the Gamut*].

3. S. Gale Dick, *The Surprising Success of Appellate Mediation*, 13 Alternatives to High Cost Litig. 41, 48 (1995).

conducted the settlement conference and served as program administrator.⁴

The CAMP program was the first response to Federal Rule of Appellate Procedure 33, adopted in 1967,⁵ which now provides as follows:

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.⁶

Pursuant to CAMP, as originally designed, the Staff Attorney would peruse all new appeals for cases that would most benefit from a settlement conference. For those cases that the Staff Attorney determined to be candidates for a successful conference, the Staff Attorney would issue a scheduling order, which would delineate the date of argument, the date of the CAMP conference, and the due date for filing briefs and the record.⁷ The Staff Attorney, counsel for the parties, and in some situations, the parties themselves, would participate in any

4. Kaufman, *New Remedies*, *supra* n. 1, at 262.

5. See e.g. *Bell v. A-Leet Leasing Corp.*, 863 F.2d 257, 259 (2d Cir. 1988).

6. Fed. R. App. P. 33. Originally, Rule 33 authorized a pre-hearing conference for federal appellate court review of agency proceedings and noted that such a procedure could be beneficial in other appeals. In 1994, the section was completely re-written to take note of several advancements in appellate ADR.

Rule 33 and the advisory committee's note to it now reflect that (1) settlement conferences are sometimes conducted following oral argument; (2) the court can require the parties or their attorneys to attend (previously, such conferences were not mandatory, unless specifically provided for by local rule); (3) settlement conferences are often conducted via telephone; and (4) an attorney must "consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case." *Id.* (Advisory Committee note).

7. Kaufman, *New Remedies*, *supra* n. 1, at 262; Kaufman, *Run the Gamut*, *supra* n. 2, at 757-758.

number of conferences, each lasting from one to several hours.⁸ However, the parties always maintained their right to proceed with an appeal if they were unable to resolve the dispute at the conferences.⁹

The CAMP program remains the cornerstone of ADR in the federal appellate courts. The Second Circuit currently employs three Staff Attorneys, each of whom conducts approximately three conferences each day.¹⁰ Whereas the Staff Attorney once culled the docket for potential CAMP participants, the court now requires all appellants in civil matters, with the exception of pro se and habeas corpus cases, to submit a pre-argument statement within ten days of filing an appeal.¹¹ In the vast majority of cases, the parties will appear before a Staff Attorney for a mandatory conference within three weeks of the date on which the appeal is docketed.¹² If, after the mandatory conference, the Staff Attorney believes that the case will not settle, the court will schedule oral argument.¹³

8. Kaufman, *New Remedies*, *supra* n. 1, at 262; Kaufman, *Run the Gamut*, *supra* n. 2, at 757-758.

9. Kaufman, *New Remedies*, *supra* n. 1, at 262; Kaufman, *Run the Gamut*, *supra* n. 2, at 757-758.

10. Dick, *supra* n. 3, at 48.

11. Kaufman, *New Remedies*, *supra* n. 1, at 262; Kaufman, *Run the Gamut*, *supra* n. 2, at 757.

12. Dick, *supra* n. 3, at 48.

13. Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* 27 (Fed. Jud. Ctr. 1997) [hereinafter, Niemic, *Sourcebook*]. Niemic describes the conference sessions as follows:

Staff counsel generally begins the conference by explaining conferencing procedures and discussing the confidentiality rules. Typically, staff counsel also seeks to establish whether the court has jurisdiction. The parties' attorneys then present their respective positions on the issues raised on appeal, with staff counsel asking pointed questions and commenting substantively when appropriate.

After listening to the attorneys for each party, staff counsel gives a nonbinding advisory opinion on the merits or on other aspects of the appeal when appropriate. In some cases, this may include a recommendation that the appeal be withdrawn. The views expressed are those of staff counsel and not those of the court. If, after completion of the conference procedure, the attorneys believe in good conscience that they cannot reach an agreement, they are not under any compulsion to do so.

If settlement or withdrawal has not been tentatively agreed to at the initial conference, staff counsel may issue a revised scheduling order. If appropriate, staff counsel is also likely to ask for follow-up discussion among the parties' attorneys or to instruct the lawyers for one or both sides to consult with their

Otherwise, the Staff Attorney will schedule another conference; this process will continue until (1) the parties settle; (2) the Staff Attorney determines that additional conferences will not have any benefit; or (3) the case is otherwise dismissed.¹⁴ By 1985, settlement conferences reduced the number of cases argued before the Second Circuit by almost twenty percent.¹⁵ By 1995, half of all appeals to the Second Circuit were resolved prior to argument.¹⁶

B. The Sixth Circuit

The judges on the other federal circuits were so impressed by the success of CAMP that they began to institute similar programs in the early and mid-1980s.¹⁷ The first to follow the Second Circuit was the Sixth, which modified the CAMP program to address geographic differences between the Second and Sixth Circuits. Whereas the Second Circuit is small in area and has a large caseload, the Sixth Circuit covers a much larger swath of the country but addresses far fewer cases.¹⁸ Accordingly, the Sixth Circuit conducts most conferences by telephone and focuses more on encouraging settlement than on case-management issues.¹⁹ Additionally, while the Second

clients and report back to staff counsel by a certain date. Based on these reports, staff counsel decides how to proceed further.

Staff counsel also may help resolve procedural matters, including, for example, a consensual stay of the district court judgment, stipulation on an expedited argument schedule, or agreement on the contents of a joint appendix. This often obviates the need for written motions.

Id.

14. Dick, *supra* n. 3, at 48.

15. Kaufman, *Run the Gamut*, *supra* n. 2, at 761 (indicating that "CAMP reduced by one-sixth the number of cases argued").

16. Dick, *supra* n. 3, at 48.

17. Niemic, *Sourcebook*, *supra* n. 13, at 3 (including chart showing starting dates). The Sixth and Eighth Circuits started programs in 1981; the Ninth Circuit implemented appellate ADR in 1984; and the D.C. Circuit created a mediation program in 1987. Since 1989, each of the remaining circuits has adopted a program—Federal Circuit in 1989; Tenth Circuit in 1991; First and Eleventh Circuits in 1992; Fourth and Seventh Circuits in 1994; Third Circuit in 1995; and Fifth Circuit in 1996. *Id.*

18. Dick, *supra* n. 3, at 48.

19. *Id.*; Niemic, *Sourcebook*, *supra* n. 13, at 54 (indicating that approximately ninety to ninety-five percent of all conferences are conducted telephonically, during calls initiated by the Staff Attorney).

Circuit attempts to evaluate the parties' arguments, often by issuing a non-binding advisory opinion, the Sixth Circuit favors an interest-based or facilitative approach, in which the Staff Attorney will discuss the parties' interests with each of them separately.²⁰

The geographic spread of the Sixth Circuit and its mediation program's resultant reliance on telephone conferences posits another interesting question: Are telephone or videoconferences as effective as live mediation? Telephone or video conferences allow persons in different places to effectively be at the same place at the same time without having to make the expenditure in time and money to meet at some potentially far-away location; however, a common perception is that participants in live conferences are more inclined to settle. While this article does not address these issues, they are interesting to consider nonetheless. The authors look forward with interest to the results of others' scholarly investigation of this topic.

C. The Third Circuit

The Third Circuit, based in Philadelphia, instituted an appellate mediation program in 1995 that is very similar to the Sixth Circuit's program. Virtually all civil matters, other than cases involving prisoners or pro se litigants, are eligible for appellate mediation.²¹ The Program Director selects from the list

20. Dick, *supra* n. 3, at 48; see also Niemic, *Sourcebook*, *supra* n. 13, at 54. Niemic describes the Sixth Circuit's procedure as follows:

At the conference, the conference attorney sets out the ground rules, emphasizes the confidentiality rules, and answers questions about court rules and procedures. Counsel for the parties explain their views on the issues raised on appeal, with the conference attorney commenting and questioning as appropriate. The conference attorney facilitates each side's understanding of the issues on appeal and usually caucuses with each side separately, exploring each party's interests and soliciting settlement ideas, offers, and counteroffers.

In about 25% of the cases, settlement is clearly impossible and negotiations go no further than the initial conference, although the conference attorney may help the parties resolve procedural issues before the conference ends. In cases that continue beyond the initial conference, the conferences conclude with discussion of next steps in the negotiations, which might include follow-up conferences or briefing extensions as appropriate.

Niemic, *Sourcebook*, *supra* n. 13, at 54.

21. *Id.* at 32.

of eligible cases those that involve non-frivolous issues that are capable of extra-judicial resolution.²² From May through October of 1995, parties filed 422 cases eligible for appellate mediation; from this group, the Program Director selected 107.²³ This rate of scheduling roughly twenty-five percent of eligible cases for mediation has remained relatively consistent throughout the life of the program.²⁴ Cases can also be referred to mediation by the parties or by the court itself immediately prior to or after oral argument.²⁵

Approximately two weeks after the parties are notified that their case has been selected for appellate mediation, confidential position papers, not in excess of ten pages, are due to the mediator.²⁶ These papers must articulate counsel's views concerning the possibility of settlement, summarize prior settlement discussions (if any), and identify other ancillary issues that must be resolved in order to effectuate any type of settlement; these confidential statements are never made available to the court or to opposing counsel.²⁷ The Program Director conducts approximately half of all mediation conferences and the senior circuit judges mediate the remainder.²⁸ No more than twenty percent of all initial conferences are conducted by telephone; unless distance or other factors preclude them, in-person conferences are preferred.²⁹

22. *Id.* at 33. Cases arising from the District of the Virgin Islands are not eligible for the program for geographic reasons.

23. *Id.*

24. *Id.*

25. *Id.* at 33-34. Presumably, after a case is argued before the court, the panel of judges may believe that strict application of the law would not do justice to the parties, so they might refer the case to mediation at that time.

26. *Id.* at 34.

27. *Id.* at 35.

28. *Id.* at 32. Niemeic describes the Third Circuit's procedure as follows:

The purpose of the mediation session is to consider the possibility of settlement and any other matters that the mediator determines may aid in the handling or disposition of the proceeding. The mediator works with the parties in an attempt to get at the real problems or interests behind the legal issues and to create an amicable solution. The conduct of the session follows the classic mediation model, including the mediator caucusing with parties and facilitating efforts to settle the case. The mediator may also mediate related issues or lawsuits that are not on appeal.

Id. at 35.

29. *Id.* at 34.

While the briefing schedule and other appellate deadlines theoretically remain in effect while a case is being mediated, in reality, the clerk of court usually does not set a briefing schedule until the matter is no longer in mediation.³⁰ However, in instances where pending mediation will affect the briefing schedule or other appellate deadlines, the mediator will usually recommend staying all court-related proceedings until mediation is concluded.³¹ Cases for which mediation does not result in an ultimate settlement return to a full briefing schedule, usually within sixty days of the original reference to mediation.³²

D. The Ninth Circuit

Like the Sixth Circuit, the Ninth Circuit does not engage in case management. The Ninth Circuit takes the facilitative approach one step further, however, by attempting to focus the parties more on the real-world implications of a case, deemphasizing the legal aspects.³³ Facing many times more cases than the Sixth Circuit, the Ninth Circuit's Staff Attorneys are far more selective in determining which cases to schedule for appellate mediation.³⁴ The Staff Attorneys utilize a two-step process to select cases,³⁵ and "[b]y hand-picking the cases they

30. *Id.* at 36.

31. *Id.*

32. *Id.*

33. Dick, *supra* n. 3, at 49.

34. Of approximately 2,500 eligible cases docketed in 1995, Staff Attorneys selected about 1000 for settlement conferences. This amounts to forty percent of the eligible cases. Niemic, *Sourcebook*, *supra* n. 13, at 72.

35. There are assessment conferences and mediation conferences. An assessment conference is used to determine whether a mediation conference will benefit the parties or the court:

Assessment conferences. The primary purpose of an assessment conference is to determine whether a mediation conference should be scheduled in the case. Usually, all counsel intending to file briefs in the case are required to attend the assessment conference, typically by telephone, and to discuss the litigation history of the case. Before the assessment conference, counsel must discuss settlement with their clients.

Mediation conferences. The primary purpose of the mediation conference is to explore settlement of the dispute that gave rise to the appellate case. The basic process used is mediation, but each case presents unique circumstances and personalities that the mediator considers in determining an appropriate settlement procedure.

handle and devoting their full attention to settlement, the Ninth Circuit's mediators have been able to accrue an impressive seventy-three percent settlement rate."³⁶

E. The D.C. Circuit

The D.C. Circuit instituted a unique program that relies on local attorneys who volunteer to mediate disputes.³⁷ The court approves experienced attorneys to participate as volunteer mediators and then trains them in mediation skills in an intensive program.³⁸ While using members of the local bar in mediation has always been a staple of trial court programs, the D.C. Circuit remains the only appellate court to exploit this resource.³⁹ To ensure that these attorneys are protected from suits filed by unhappy parties to a mediation, the D.C. Circuit has provided, by rule of court, that voluntary mediators enjoy quasi-judicial immunity while mediating, as (1) "the functions of the official in question are comparable to those of a judge"; (2) "the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect"; and (3) "the system contains safeguards which are adequate to

Counsel are required to attend mediation conferences with authority to discuss the feasibility of various settlement processes, to make and respond to settlement proposals, and to settle. The mediator may conduct follow-up conferences, either in separate or joint sessions, in person or by telephone. In exceptional circumstances, the mediator may refer a case to a judge or another mediator for mediation.

In addition to mediating issues on appeal, the program may also mediate related disputes. If settlement is not reached, the mediator addresses any jurisdictional issues and works with counsel to develop the most efficient and expeditious plan for disposition of the case. This may include limiting the issues, limiting briefing, defining the record on appeal, or staying the appeal pending some contingency such as disposition of a related case.

Niemic, *supra* n. 13, at 75-76.

36. Dick, *supra* n. 3, at 49.

37. Robert J. Niemic, *On Appeal: Mediation Becoming More Appealing in Federal and State Courts*, *Dispute Resolution* 15 (Summer 1999) [hereinafter Niemic, *On Appeal*].

38. Niemic, *Sourcebook*, *supra* n. 13, at 100. Mediators are generally assigned to cases in subject areas in which they have some expertise. *Id.*

39. Niemic, *On Appeal*, *supra* n. 37, at 15.

justify dispensing with private damage suits to control unconstitutional conduct.”⁴⁰

The D.C. Circuit program is also distinctive in its selectivity and its well-developed criteria for admission. The program director selects approximately sixty cases each year for mediation, based on (1) the nature of the underlying dispute; (2) the relationship of the issues on appeal to the underlying dispute; (3) the availability of incentives to reach settlement or limit the issues on appeal; (4) the susceptibility of the issues to mediation; (5) the possibility of effectuating a resolution; (6) the number of parties; and (7) the number of related pending cases.⁴¹ Because the court only attempts to mediate sixty cases in a given year, its goal is to “offer a service to parties whose needs may be better served by creative settlement than by judicial resolution,” not to control the docket.⁴² The D.C. Circuit does not go as far to facilitate settlement as does the Ninth Circuit.⁴³ As a result, the court’s program has accrued a less-impressive thirty percent

40. *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994); see also *Simons v. Bellinger*, 643 F.2d 774, 778 (D.C. Cir. 1980); *Butz v. Economou*, 438 U.S. 478, 512 (1978).

41. Niemic, *Sourcebook*, *supra* n. 13, at 95. Niemic explains that

[c]ases which might not be deemed appropriate for mediation include those involving many parties from distant parts of the country or those in which one or more of the parties require a judicial resolution of the issues on appeal. Before selecting a case for mediation, the director usually solicits the views of lead counsel about the suitability of referring the case to a mediator. Counsel’s views on this matter, however, are not dispositive.

Id.

42. Dick, *supra* n. 3, at 50 (quoting interview by S. Gale Dick with Nancy E. Stanley, Dir. of Dispute Resolution, U.S. Ct. of Appeals for the D.C. Cir.).

43. Niemic, *Sourcebook*, *supra* n. 13, at 97. Niemic describes the D.C. Circuit’s procedure as follows:

The objective of the mediation is to facilitate settlement, simplify issues, or otherwise assist in the expeditious handling of the appeal. Mediation begins at a joint meeting attended by the mediator, counsel for the parties, and, whenever possible, the parties themselves. After the mediator explains how the mediation is to be conducted, each party is asked to explain its views on the matter in dispute. Appellant will typically speak first. The mediator is likely to refrain from asking questions, or allowing participants to ask questions of one another, until all parties have had an opportunity to speak. After this, the mediator often caucuses individually with each side, to explore more fully the needs and interests underlying stated positions and to help parties explore settlement options. Additional meetings may be held to explore settlement possibilities or to help the parties finalize an agreement.

Id.

settlement rate, although it considers more time-consuming and multi-issue cases, especially suits against agencies of the federal and D.C. local governments, which are the sorts of cases from which other appellate mediation programs shy away.⁴⁴

F. Early State Programs

Numerous state courts have followed suit, instituting appellate mediation programs to handle burgeoning caseloads. California's Third District Court of Appeals, an intermediate appellate court sitting in Sacramento, was the first state appellate court to enter the ADR realm, instituting a program almost identical to the Second Circuit's CAMP, with a group of retired judges serving as voluntary mediators.⁴⁵ The program succeeded, routinely settling thirty to forty percent of its cases, but the court abandoned the initiative in 1993 due to budget cuts.⁴⁶ Unfortunately, most state court appellate mediation programs created in the 1970s and early 1980s did not fare as well as the California program, in many cases fizzling out after one or two years.⁴⁷ These programs failed in large part because they were developed as projects that were strongly supported by only one judge on the relevant court, did not employ enough persons qualified to mediate the disputes, and suffered from debilitating financial constraints.⁴⁸

The Missouri Court of Appeals for the Eastern District, an intermediate appellate court based in St. Louis, boasts one of the oldest continuously operating state court appellate mediation

44. Dick, *supra* n. 3, at 50.

45. Nancy Neal Yeend, *State Appellate ADR: National Survey and Use Analysis with Implementation Guidelines* 2-1 (John Paul Jones Group 2002); Dick, *supra* n. 3, at 49.

46. Dick, *supra* n. 3, at 49. According to Yeend, the program lost its champion, Judge George Paras, who retired in 1984. For the next decade, the court continued to use appellate mediation to a lesser degree, but its fall from favor was complete by 1994, when the court abandoned the program by Order dated November 30, 1994. Yeend, *supra* n. 45, at app. D-5C.

47. *Id.* at 2-1 to 2-3. The Pennsylvania Superior Court had a program in the mid-1980s, but it lasted for only one year. *Id.* at app. D-38. Likewise, Georgia, Indiana, Iowa, Louisiana, Minnesota, Nebraska, North Carolina, South Carolina, South Dakota, and Washington instituted appellate ADR programs in the 1980s and later abandoned them. *Id.* at 2-3, n. 36.

48. *Id.* at 2-3.

programs, founded in 1976.⁴⁹ One of the sitting judges on that court serves as Settlement Judge; the assignment rotates among the fourteen judges on an annual basis.⁵⁰ With jurists serving as mediators, this program tends to be more evaluative than facilitative, similar to that of the Second Circuit. It is unclear if the jurists are required to recuse themselves if they happen to be assigned to a panel hearing a case that they considered while serving as mediator.

The court established the settlement conference procedure pursuant to a local court rule, which provides that

[a]fter the notice of appeal has been filed, the court may schedule a conference for the purpose of exploring the possibility of settlement. The court may stay the requirements for ordering the record on appeal, filing the record, or briefs in order to facilitate the settlement process.⁵¹

The Settlement Judge screens cases on the appellate docket to determine those cases in which the best interests of the parties would be to settle. The program utilizes sitting judges as mediators because “their assessment of the merits of the case will hold more weight among the parties.”⁵² Additionally, clients are not permitted to attend the conferences, because their presence would hamper the ability of the lawyers to discuss the strengths and weaknesses of their positions openly, and that of the Settlement Judge to give a fair and accurate assessment of the case to the attorneys.⁵³

The Missouri program has achieved significant and sustained success, settling approximately forty percent of the cases referred to it for disposition.⁵⁴ The court as a whole considers approximately 1,500 cases each year, 300 to 400 of which are scheduled for mandatory settlement conferences.⁵⁵ While this is not a statewide program, this single Missouri court

49. *Id.* at 2-2, n. 28.

50. Dick, *supra* n. 3, at 49-50.

51. Mo. App. E. Dist. Loc. R. 320.

52. Dick, *supra* n. 3, at 50 (quoting Gary M. Gaertner, J., 1995 Settlement J., Mo. Ct. App., E. Dist., St. Louis, Mo.).

53. *Id.*

54. *Id.*

55. Yeend, *supra* n. 45, at app. D-25A. It is unclear what percentage of cases the court considers are civil in nature and what percentage are criminal in nature.

has illuminated the path for appellate courts in other states to effectively implement some form of ADR.

III. THE SECOND WAVE

Within the past decade many states have either re-instituted or created new appellate mediation programs. As of 2002, thirty-one states had ADR programs at some appellate level;⁵⁶ six of these programs were at the highest court of that state.⁵⁷

A. The Massachusetts Appeals Court

In the summer of 1992, Chief Justice Liacos of the Supreme Judicial Court of Massachusetts spearheaded a push to bring mediation to the Massachusetts Appeals Court, an intermediate appellate court.⁵⁸ He applied for and received a Massachusetts Bar Foundation grant to establish the program as an experiment.⁵⁹ The money funded the creation of a staff position to manage the operations of the program and the program budget for two years; the Appeals Court selected a retired federal trial judge, a dean of one of the in-state law schools, and an experienced private lawyer to conduct mediation conferences.⁶⁰ During its first six months of operation, the program accepted approximately ten cases per month; in April of 1993, the court appointed eleven additional attorneys to conduct conferences and the caseload of the program expanded

56. *Id.* at 2-3, n. 37 (listing Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, West Virginia, and Wisconsin among states having appellate ADR programs).

57. *Id.* at 2-3, n. 40. (noting that "Montana and Nevada do not have intermediate courts of appeal, but have active appellate programs at their Supreme Court level," that "Rhode Island's supreme court periodically uses settlement conferences," that "Vermont's uses ADR upon occasion," and that "Tennessee and West Virginia use their highest court's ADR program only for Worker Compensation cases").

58. Corrine Hirsch, *The Massachusetts Appeals Court Conference Program: Appellate ADR in Progress*, 40 Boston Bar J. 10, 27 (1996).

59. *Id.*

60. *Id.*

concomitantly.⁶¹ From July of 1993 through July of 1994, the group of arbiters conducted conferences in about 170 cases.⁶²

The program considers civil cases except those involving, for example, (1) litigants who are proceeding pro se; (2) adoption and other care-of-minors issues; and (3) civil commitment petitions.⁶³ The Justices of the Supreme Judicial Court decided to make entry into the program mandatory; in other words, the attorneys for parties in cases selected for appellate mediation had to participate in one settlement conference, but the decision about whether to participate in additional conferences or to proceed with the appeal is made independently by the parties and their attorneys.⁶⁴ The attorneys of record in cases that might be required to participate in the conference program were contacted within two weeks of docketing the appeal in the Appeals Court and were asked to complete a Conference Statement, which gave the Conference Program staff a quick view of the case and allowed them to determine whether the case was suitable for the program.⁶⁵ The Program has retained these features.

By July of 1994, the funds provided by the Massachusetts Bar Foundation had been exhausted, but after reviewing the experiment, the Justices of the Supreme Judicial Court concluded that the program was a resounding success and, accordingly, institutionalized it within the court system.⁶⁶ In its first official year, the Massachusetts Appeals Court Conference

61. *Id.*

62. *Id.*

63. *Id.* at 10.

64. *Id.* at 11. The Justices articulated two reasons for mandating participation in selected cases:

First, in order to assess how well the program worked and which kinds of cases did best, the court needed to be sure that a broad range and a sufficient number of cases would enter the program. Second, administrators of appellate ADR programs in other jurisdictions had reported that attorneys expressed satisfaction with mandatory programs. Some were pleased at being provided a forum for negotiation without having first to broach the idea to the other side. Others had initially believed that their appeal had no chance of settling, only to achieve settlement through conference. Finally, some purely voluntary programs had been terminated because too few cases were handled to justify the program's administrative expenses.

Id.; see also *id.* at 27 (noting that settling some cases requires more than one conference).

65. *Id.* at 11, 27.

66. *Id.* at 27.

Program provided approximately three hundred conferences, almost forty percent of which reached full settlement without further recourse in the courts.⁶⁷ The Boston Bar Journal reported that

[t]his settlement rate is more than triple the settlement rate for civil appeals in the two years before the program began, and more than seventy-five percent higher than the combined rate of settlements and dismissals for lack of prosecution in the same period.⁶⁸

In more than a third of the cases that did not reach full settlement through the program, the parties nevertheless benefited palpably from presenting their positions to a conference leader—either simplification or clarification of issues on appeal.⁶⁹ In 2000, of the approximately 980 civil cases filed in the Massachusetts Court of Appeals, 359 were selected for settlement conferences, with forty-four percent of those cases reaching full settlement.⁷⁰

B. The New Mexico Court of Appeals

In September of 1998, the New Mexico Court of Appeals, an intermediate appellate court, instituted a pilot mediation program⁷¹ for much the same reasons that the Massachusetts Court of Appeals and the myriad other state and federal appellate courts had employed appellate mediation—chiefly, to reduce burgeoning caseloads.⁷² Similar to the Massachusetts Appeals Court, the New Mexico Court of Appeals decided not to use a sitting judge as a mediator.⁷³ The program creators

67. *Id.*

68. *Id.*

69. *Id.* at 27-28 (noting that either formal stipulations or informal means of clarifying the issues may be used in particular cases).

70. Yeend, *supra* n. 45, at app. D-21.

71. Sometimes these programs are referred to as settlement conference programs, which terms are used interchangeably throughout this article. The purpose of the programs discussed in this article is facilitative mediation. *See generally* Yeend, *supra* n. 45.

72. Richard Becker, *Mediation in the New Mexico Court of Appeals*, 1 J. App. Prac. & Process 367 (1999); *see also* Roger A. Hanson & Richard Becker, *Appellate Mediation in New Mexico: An Evaluation*, 4 J. App. Prac. & Process 167 (2002) (updating 1999 information).

73. Becker, *supra* n. 72, at 372.

considered using volunteers to run the mediation conferences. They noted the benefits of utilizing volunteers—"prestige for the program, no cost for conferences, bar involvement, geographic diversity, and specialized knowledge"—but ultimately determined that the inherent problems—"limitations on availability, lack of quality control, difficult recruitment/exclusion issues, experience spread thin, need to provide training, administrative burden, and immunity concerns"—of such an approach would vitiate the intended benefit of the program.⁷⁴ In the end, the program creators settled on a single staff appellate mediator,⁷⁵ and chose as the first mediator a lawyer who had worked with the program creators, served as a staff attorney for the New Mexico Court of Appeals for almost a decade, and had functioned as a mediator in numerous New Mexico courts of original jurisdiction.⁷⁶

All pending civil cases except those involving a prisoner, a pro se litigant, a driver's license revocation, a petition for extraordinary relief, or those arising from either the Mental Health and Development Code or the Children's Code, are potential targets of the mediation program.⁷⁷ The majority of cases scheduled for mediation conferences are selected by the mediation program staff at random from all eligible appeals.⁷⁸ In some instances, however, the panel of judges assigned to hear the appeal will transfer cases to the program either before or after briefing, and counsel for either party can request a mediation conference, which request the program staff usually grants.⁷⁹ The court determined that random selection would be the best method of picking cases in part because the program

74. *Id.*

75. *Id.* at 372-73; see also N.M. App. Order. No. 1-24 (*In re Court of Appeals Settlement Conference Procedures*) (available at <http://coa.nmcourts.com/mediation/orderstab.pdf> (accessed Aug. 19, 2003; copy on file with Journal of Appellate Practice and Process)).

76. N.M. App. Mediation Conference Procedures and Suggestions for Effective Mediation Representation, <http://www.nmcourts.com/FTP/stuffer.pdf> (accessed Aug. 19, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *Procedures & Suggestions*]. The mediator is an attorney trained in modern mediation methods. See <http://www.coa.nmcourts.com/mediation/rambo.pdf> (noting mediator's qualifications) (accessed Sept. 11, 2003; copy on file with Journal of Appellate Practice and Process).

77. *Procedures & Suggestions*, *supra* n. 76, at 1.

78. *Id.*

79. *Id.*

creators' review of myriad other appellate mediation programs taught them that it is nearly impossible to predict the cases in which mediation conferences will ultimately be successful.⁸⁰ Participation in a mediation conference is mandatory if the case is selected.⁸¹

Typically, the program staff will contact the litigants in cases chosen for mediation before the commencement of briefing to cut down on the costs to the parties.⁸² However, the appellate schedule remains in effect.⁸³ At the beginning of a conference, the mediator will attempt to resolve any outstanding procedural issues before discussing the substantive elements of the conflict.⁸⁴ Once the preliminary matters are addressed,

[t]he legal issues may be directly discussed. However, the purpose is not to decide or reach a conclusion about the merits of the appeal, but rather to facilitate an understanding of the issues and an evaluation of the risks and opportunities for each side.⁸⁵

If the parties are unable to come to a settlement agreement after one or several conferences, the mediator can make suggestions to the parties, which the parties are free to reject if they so choose.⁸⁶

From the program's inception in September of 1998 until June of 2000, 308 cases were scheduled for settlement conferences, of which eighty-eight settled—a twenty-nine

80. Becker, *supra* n. 72, at 373.

81. *Id.* at 375. Becker reports that four important assumptions underlie the court's decision to implement a compulsory program:

First, lawyers are often reluctant to initiate settlement negotiations out of a concern for displaying weakness. Second, the appellate process, unlike trial proceedings, presents few opportunities for the parties to discuss settlement. Third, a mediator can help parties accomplish what they cannot accomplish alone. Finally, a mediation office, operating with confidentiality apart from the court's decisional process, can offer flexibility otherwise unavailable in a formal appellate court setting. No one, of course, is required to settle.

Id.

82. *Id.* at 374.

83. *Id.*

84. *Procedures & Suggestions*, *supra* n. 76, at 2.

85. *Id.*

86. Becker, *supra* n. 72, at 376.

percent settlement rate.⁸⁷ Approximately 500 civil appeals are filed each year in the court, meaning that almost one-third of all civil cases are scheduled for appellate mediation.⁸⁸ A report prepared for the New Mexico Administrative Office of the Courts and the Court of Appeals of New Mexico pursuant to a grant from the State Justice Institute concluded in March of 2001 that the New Mexico program had achieved an excellent rate of settlement.⁸⁹ Robert Hanson, the author of *Appellate Review and Mediation in New Mexico*, asked attorneys who had participated in settlement conferences between September 15, 1998, and September 30, 2000, to complete surveys rating their experiences, whether the mediation conferences ultimately proved successful.⁹⁰ Sixty-one percent of all attorneys who completed the surveys reported that the mediator improved communication between the sides and sixty-seven percent agreed that the mediator helped to identify options.⁹¹ Interestingly, more than half of the attorneys whose cases did not settle indicated that the mediator helped to clarify some issues, and almost half reported that he also helped them resolve some issues.⁹²

87. Roger A. Hanson, *Appellate Review and Mediation in New Mexico* 7 (available at <http://www.factory7.com/~rah/NMMediation.pdf>) (accessed Sept. 11, 2003; copy on file with Journal of Appellate Practice and Process).

88. Hanson, *supra* n. 87, at 4.

89. *Id.* at 8. Hanson explains there that New Mexico's settlement procedure achieves a substantial number of negotiated agreements under conditions not assumed to be amenable to such an initiative. Mediation is occurring after a form of summary disposition has failed or has been deemed to be unsuitable given the complexity, difficulty or purely legal nature of the case and its issues. Early court intervention into primarily routine cases is assumed to be essential for reaching negotiated agreements. New Mexico's program should be expected to produce few, if any, settlements. Hence, the figure of 29 percent is substantial.

Id.

90. Hanson asked, *inter alia*, the following questions:

- 1) Did the mediator help improve communication between the parties?
- 2) Did the mediator help identify options and alternatives?
- 3) Did the mediator help evaluate the risk of continued litigation?
- 4) Did the mediator help resolve procedural issues?
- 5) Did the mediator help clarify issues?

Hanson, *supra* n. 87, at 23-24.

91. *Id.* at 12-13.

92. *Id.* at 13.

Hanson found that the cost of running the program for one year, leading to settlement of an average of forty-four cases, amounted to approximately \$97,000.00.⁹³ Hanson equated the forty-four cases settled each year with the average workload of a New Mexico Court of Appeals judge and determined that the \$97,000.00 spent on mediation conferences was an efficient use of that money.⁹⁴ Furthermore, the study found that the time spent from docketing of an appeal until a case reaches settlement is 266 days, far fewer than the 450 days it takes for the court to rule on an average appeal.⁹⁵

C. Supreme Court of Nevada

One of the most successful and prolific appellate mediation programs resides in the Supreme Court of Nevada, the only appellate court in that state.⁹⁶ In March of 1997, the Supreme Court of Nevada turned to appellate mediation to, according to one of the settlement judges, “deal with the exponential growth in appeals over the past several years.”⁹⁷ To effectuate an appellate mediation program, the Justices of the Nevada Supreme Court adopted Nevada Rule of Appellate Procedure 16, which permits a settlement conference for any civil appeal.⁹⁸ As soon as the Clerk of the Court notifies the parties that a settlement conference will be scheduled, all appellate requirements, such as the filing of transcripts and briefs, are stayed.⁹⁹ Instead, the litigants must file a settlement statement, not to exceed five pages, which sets forth

- (1) the relevant facts; (2) the issues on appeal; (3) the argument supporting the party’s position on appeal; (4) the weakest points of the party’s position on appeal; (5) the settlement proposal that the party believes would be fair or

93. *Id.* at 15.

94. *Id.* at 15-16.

95. *Id.* at 16. According to the study, the mediation process takes an average of approximately ten weeks to either reach settlement or for the parties and mediator to conclude at last that additional attempts at settlement will prove fruitless.

96. Yeend, *supra* n. 45, at p. 2-3, n. 40, & app. D-28.

97. Larry J. Cohen & Wes Mashburn, *The Ten Principles of Successful Appellate Mediation in Nevada*, Nev. Law. 19, 19 (Dec. 1999).

98. Nev. R. App. P. 16(a).

99. Nev. R. App. P. 16(c).

would be willing to make in order to conclude the matter; and (6) all matters which, in counsel's professional opinion, may assist the settlement judge in conducting the settlement conference.¹⁰⁰

The Clerk assigns one of approximately ninety mediators to cases on a rotating basis, while also considering the type of case.¹⁰¹

Unlike those used in the appellate mediation programs in Massachusetts and New Mexico, Nevada Supreme Court mediation conferences do not follow any pre-determined structure; the mediators are permitted great discretion in setting the agenda and sequence of presentation.¹⁰² Ten days after the conference, the mediator files a report with the Supreme Court detailing the course of the negotiations (but not disclosing matters discussed at the conference) and also disclosing the result, if any.¹⁰³ The rules only require that all parties participate in good faith:

The failure of a party, or the party's counsel, to participate in good faith in the settlement conference process is grounds for sanctions against the party, the party's counsel, or both. The filing of a frivolous appeal is also grounds for sanctions. Sanctions include, but are not limited to, payment of attorney's fees and costs of the opposing party, dismissal of the appeal, or reversal of the judgment below.¹⁰⁴

The Court takes the requirement that all parties act in good faith very seriously; the Court has shown its willingness to impose sanctions in several cases in which the parties did not genuinely attempt to settle.¹⁰⁵

Between institution of the program in 1997 and the end of 2001, the settlement judges attempted mediation in approximately 2,500 cases; almost 1,400 of these cases have reached settlement, representing an effective settlement rate of

100. Nev. R. App. P. 16(d).

101. Yeend, *supra* n. 45, at app. D-28. The mediators are senior justices of the Nevada Supreme Court, senior judges of the Nevada trial courts, or other judicial officers appointed by the Court. Nev. R. App. P. 16(a).

102. Nev. R. App. P. 16(e).

103. Nev. R. App. P. 16(g); Cohen & Mashburn, *supra* n. 97, at 19-20.

104. Nev. R. App. P. 16(f).

105. Cohen & Mashburn, *supra* n. 97, at 22, n. 7.

fifty-six percent.¹⁰⁶ This is an impressive rate of settlement, but not necessarily surprising given that the Court allocates a much larger percentage of its financial resources and human capital to the appellate mediation program than do programs in other states. The program is also very prolific. In 2001, for example, parties filed 713 civil appeals, 546 of which (or approximately eighty percent) were assigned to the settlement program.¹⁰⁷

While most other courts spend no more than \$100,000 per year on appellate mediation, Nevada budgets approximately \$350,000 each year for this program.¹⁰⁸ Additionally, with ninety mediators at the disposal of the Court, Nevada's program administrator can choose one who is familiar with the issues at hand and will consequently be able to more fairly adjudge the relative positions of the parties, making the process more user-friendly.¹⁰⁹

IV. THE PENNSYLVANIA EXPERIENCE: THE COMMONWEALTH COURT

Recognizing the numerous and varied benefits of appellate mediation generally, and the marked successes that appellate mediation programs had reaped in other states during the 1990s, the Commonwealth Court of Pennsylvania established an appellate mediation program effective January 1, 2000.¹¹⁰ Cases eligible for mediation are: (1) counseled appeals of orders of the courts of common pleas; (2) counseled appeals of administrative agency decisions; (3) counseled actions filed in the original jurisdiction of the Commonwealth Court.¹¹¹ These cases "may be referred at the discretion of the Court to the Court's

106. Yeend, *supra* n. 45, at app. D-28.

107. *Id.*

108. See generally Yeend, *supra* n. 45, at app. D-28; see also *id.* at app. D-1 to D-50. The First Appellate District of California's Court of Appeal, which instituted appellate mediation in July of 1999, reports that it has experienced a fifty-nine percent settlement rate at a cost of \$283,000 per year. *Id.* at app. D-5A.

109. *Id.* at app. D-28.

110. 210 Pa. Code § 67.71 (I.O.P. of Pa. Cmmw. Ct. 501) [hereinafter I.O.P. 501].

111. *Id.* (indicating also that tax appeals and cases where one of the parties is proceeding pro se are exempt). The Commonwealth Court's mediation program for original-jurisdiction cases brought against the Commonwealth or its officers exceeds the scope of this article, and will not be addressed here.

Mediation Program to facilitate settlement and otherwise to assist in the expeditious resolution of matters before the Court.”¹¹²

The President Judge of the Commonwealth Court selects one of the Senior Judges of that court to serve as the coordinator of the Mediation Program; the coordinator screens eligible cases to determine whether any are suitable for inclusion.¹¹³ The parties can also request inclusion and, for cases not selected, the judges may direct the parties to enter the program.¹¹⁴

Within ten days of filing an appeal or a petition for review, the party challenging the lower tribunal’s decision or seeking relief must file a Statement of Issues with the normal appellate docketing statement.¹¹⁵ According to the Internal Operating Procedures of the Commonwealth Court,

[t]he Statement of Issues shall be no more than two pages in length and shall set forth a brief summary of the issues and a summary of the case necessary for an understanding of the nature of the appeal, petition for review or complaint.¹¹⁶

Once the coordinator selects a case for participation in the program, the court clerk notifies counsel for the parties, who then have ten days to provide the mediation judge with a Mediation Statement. The Mediation Statement cannot be longer than five pages, and must set forth the key facts and issues, whether the parties have attempted to settle out of court, and the disposition of any motions filed in the court.¹¹⁷

As in the New Mexico program, but unlike that of the Nevada Supreme Court, scheduled proceedings before the Commonwealth Court are not stayed unless the mediation judge

112. *Id.*

113. *Id.* Senior Judge Emil Narick served as the first mediation judge until his retirement in mid-2003. Currently, Senior Judges Charles Mirarchi, Joseph McCloskey, and Jess Jiuliente sit as mediation judges, while John Gordon serves as Program Administrator. In an effort to limit the travel required of litigants, Senior Judge Mirarchi conducts conferences in Philadelphia, Senior Judge McCloskey conducts them in Harrisburg, and Senior Judge Jiuliente conducts conferences in both Pittsburgh and Erie.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* Additionally, for those cases in the appellate jurisdiction of the Commonwealth Court, the parties are directed to file a copy of the Orders appealed from and any opinion or written adjudication prepared by the trial court or administrative agency. *Id.*

so directs the court in order to accommodate additional mediation sessions.¹¹⁸ The mediator has the discretion to mandate the attendance of the parties at the mediation conference.¹¹⁹ However, according to the 2000 Annual Report of the Commonwealth Court, the mediation judge does not ask the parties to attend, but does request that they be available by telephone.¹²⁰ Additionally, each party must send counsel with authority to settle.¹²¹

If, after the original mediation conference, the parties have not agreed on a settlement but the mediation judge believes that additional sessions will lead to settlement, the mediation judge can order additional conferences.¹²² Failure to comply with the procedures set out in the I.O.P. can lead to sanctions.¹²³ If the mediation conferences do not end in settlement, neither the mediation judge nor the parties can disclose the substance of the negotiations to the court. According to the court rule,

[n]o information obtained during settlement discussions shall be construed as an admission against interest, and counsel shall not use any information obtained during settlement discussions as the basis for any motion or application.¹²⁴

All confidential documents other than those related to the Court's briefing or argument scheduling that have been submitted to the mediation judge are destroyed immediately upon the termination of mediation proceedings.¹²⁵

118. *Id.*

119. *Id.* In cases involving the Commonwealth government, which comprise a significant portion of the caseload of the Commonwealth Court,

upon direction of the mediation judge, counsel shall have available someone from the appropriate agency with authority to settle who can be reached during mediation to discuss settlement if such person is not already required to be in attendance by the mediation judge. The mediation judge may in the alternative obtain the name and title of the government official or officials authorized to settle on behalf of the state or local government unit.

Id.

120. Pa. Cmmw. Ct., *Annual Rep. 2000*, at 60.

121. I.O.P. 501, *supra* n. 110.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

In 2000, the first year of the program, 286 cases were referred to appellate mediation, representing approximately eight percent of all appeals filed in the Commonwealth Court.¹²⁶ Of those 286 cases, 263 proceeded to at least one mediation conference and 123, or approximately 47%, settled extra-judicially.¹²⁷ In 2001, approximately 4,100 new appeals were filed, 331 of which were referred to mediation.¹²⁸ Of the 309 cases actually mediated in 2001, 141 settled, resulting in a settlement rate of approximately forty-five percent.¹²⁹ The number of cases that the program settled over the first two years is equivalent to the workload of a three-judge panel over that same time period, which the program administrator considers a success.¹³⁰

V. THE PENNSYLVANIA EXPERIENCE: EXTENDING THE COMMONWEALTH COURT'S PROGRAM

The Commonwealth Court's appellate mediation program is a proven success in its first two-and-one-half years of existence. The program was instituted to eliminate the expense and time of taking an appeal, with the added benefit that a settlement, by definition, is a result with which all parties are satisfied.¹³¹ It has reaped those benefits in at least the forty-seven percent of mediated cases in which the mediation judge is able to broker a settlement.

The Commonwealth Court's program, however, was not the first foray into the realm of appellate mediation in Pennsylvania. In the early 1980s, operating on a limited-term

126. *Annual Report 2000*, *supra* n. 120, at 5, 59 (indicating that 4,285 cases were filed with the court in 2000, and that approximately 500 of those were filed in the court's original jurisdiction).

127. *Id.* at 59. Further, of the fourteen original jurisdiction cases, six settled without the need for a court decision. *Id.*

128. Pa. Cmmw. Ct., *2001 Statistical Report*, summary p. 2 (available at <http://www.courts.state.pa.us/Index/Cwealth/ccstatrep2001.pdf>) (accessed Aug. 19, 2003; copy on file with Journal of Appellate Practice and Process).

129. *Id.*

130. Yeend, *supra* n. 45, at app. D-38; Telephone Interviews by Scott E. Friedman with John Gordon, Adminstr., Pa. Cmmw. Ct. Mediation Program (Nov. 2001-Feb. 2002) (interview notes on file with Mr. Friedman).

131. *Annual Report 2000*, *supra* n. 120, at 58.

grant from the National Center of State Courts, President Judge Emeritus William F. Cercone and Judge J. Sydney Hoffman created a settlement conference program in the Superior Court in an attempt to reduce backlogs in that court—the average appeal at that time took almost three years from docketing to decision.¹³² The program was a marked success and, along with the creation of new judgeships on the court, helped to drastically reduce the backlog.¹³³ The program continued for at least several months after the grant expired, but as a result of the decrease in time it took for the court to dispose of cases, as well as the expiration of the National Center for State Courts funding, the program was disbanded.¹³⁴

While the Superior Court has maintained an excellent record in disposing of cases in relatively short stead and the Commonwealth Court appellate mediation program has proved successful, now is not a time for our courts to rest on their laurels. The experiences of appellate courts in other states indicate that appellate mediation programs can reach greater percentages of litigants with no decrease in success rates. We should devote additional funds to expand the Commonwealth Court's program and engage in further research to determine if reinstitution of an appellate mediation program in the Superior Court would prove beneficial. The more we are able to encourage parties to settle amicably, the more efficient our system of justice becomes and the more time we have to devote to those cases that remain before us. Appellate mediation benefits not only the courts, but also the parties, who are able to save time and money by mediating their disputes.



132. Telephone Interview by Scott E. Friedman with David A. Szewczak, Prothonotary, Pa. Sup. Ct., E. Dist. (July 3, 2002) (interview notes on file with Mr. Friedman).

133. *Id.*

134. *Id.*

